

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 13-41(REVISED)

April 29, 2013

TO: Regional Directors, Officers-in-Charge, Resident Officers,
Compliance Supervisors and Compliance Officers

FROM: Anne Purcell, Associate General Counsel

Subject: Guidance on When to Seek Modification of Previously Issued
Board Orders to Incorporate *Latino Express* Remedies

This memorandum provides guidance to the Regions in determining whether to seek modification of a previously issued order in a pending case to include the additional remedies ordered by the Board in *Latino Express*.

In *Latino Express, Inc.*, 359 NLRB No. 44 (2012), the Board adopted the Acting General Counsel's proposed remedies requiring respondents: 1) to compensate discriminatees for the adverse tax consequences of receiving lump-sum backpay awards covering periods longer than one year and 2) to file a report with the Social Security Administration (SSA) allocating discriminatees' backpay to the appropriate calendar quarters. As noted in [GC 13-03\(CH\)](#), these new remedies are designed to better serve the remedial policies of the National Labor Relations Act by ensuring that discriminatees are truly made whole for the discrimination they have suffered. With regard to the reporting requirement to SSA, the Board decided to apply this new policy retroactively, stating that it was following its usual practice of applying new policies and standards "to all pending cases in whatever stage." This means that in all pending cases involving backpay in which there is not a court judgment, Regions should be requiring charged party/respondent to submit the SSA form.¹ Regarding the excess tax liability provision, the Board decided to apply this policy to pending cases not already in the compliance stage as of December 18, 2012. In a recent case, *Lee's Industries, Inc.*, 359 NLRB No. 69 (2013), the Board noted that "nothing in *Latino Express* prevents the Acting General Counsel from requesting that the Board modify a previously issued order in a pending case to include an applicable remedy, at least where the Board still has jurisdiction to do so."

In light of the Board's decision in *Lee's Industries*, Regions should review all pending compliance cases in which a Board order issued prior to December 18, 2012 that involved the payment of backpay where discriminatees could be affected by the excess tax liability reimbursement. When deciding whether to file a motion to modify the remedial provisions with the Board in these cases, the Region should consider whether respondent has complied with the Board's order or is engaged in serious discussions with the Region regarding compliance efforts. If the case is pending before an appellate court, the Region should discuss with Deputy Associate General

¹ See below for an explanation of cases in which the SSA form should be submitted.

Counsel Linda Dreeben or Assistant General Counsel David Habenstreit whether it is prudent to withdraw the case before the court in order to file a motion to modify. A sample Motion to Modify Remedial Order is attached in the event the Region determines it is appropriate to ask the Board to modify its current order's remedial provisions to comport with the Board's decision in *Latino Express, Inc.*

Several questions have been raised regarding the application of the excess tax liability reimbursement and the filing requirement with SSA. The following information is being provided as additional guidance:

- The excess tax liability reimbursement and the obligation to report to SSA the appropriate quarterly allocations should be included in all informal and formal settlements in which the backpay period spans two or more years or where backpay is being paid in a year different from when the backpay was earned. The excess tax liability reimbursement and reporting to SSA has been incorporated into both the Informal Settlement Agreement template as well as the optional paragraphs for the Notice to Employees.
- It is important to remember that in order to ensure discriminatees are made whole, the excess tax liability reimbursement, no matter how small, should be calculated and collected in every case. The link to the Excess Tax Calculator and instructions on using the Excess Tax Calculator has been posted on the [Compliance Website](#). In cases involving a large number of discriminatees where it may be burdensome to calculate each discriminatee's excess tax liability, Regions may consider calculating the liability of a representative sample of randomly selected discriminatees and then applying the results to all discriminatees.
- In cases involving installment payment plans, the reporting of backpay to SSA should be done at the end of the installment plan once all of the backpay has been paid.
- In cases involving the payment of front pay pursuant to [GC 13-02](#), unless the settlement agreement sets forth the period of time the front pay is intended to cover, i.e. in lieu of two years of future employment, the front pay should be reported to SSA as payment of wages in the year in which the payment was made.

If you have any questions regarding this memorandum, please contact your AGC or Deputy. Thank you for your continued efforts to accomplish this important General Counsel initiative.

/s/
A.P.

cc: NLRBU
Attachment (Sample Motion to Modify Remedial Order)

Draft of Motion to Modify Board Order
(*Latino Express, Inc.*)

1. On [date], the Board, as part of its order to remedy respondent's unfair labor practices, ordered that certain discriminatees be made whole for any loss of earnings or other benefits suffered as a result of the discrimination against them.
2. On December 18, 2012, the Board, in *Latino Express, Inc.*, 359 NLRB No. 44, revisited and revised its remedial strategies and stated that it shall now "routinely require respondents to compensate employees for the adverse tax consequences of receiving one or more lump-sum backpay awards covering periods longer than 1 year."
3. In its holding, the Board specifically stated that it would apply its new rule retroactively.
4. In *Lee's Industries, Inc.*, 359 NLRB No. 69 (February 28, 2013), the Board noted that "nothing in *Latino Express, Inc.* prevents the Acting General Counsel from requesting that the Board modify a previously issued order in a pending case to include an applicable remedy, at least where the Board still has jurisdiction to do so."
5. Under Section 10(d) of the National Labor Relations Act, "[u]ntil the record in a case [is] . . . filed in a court . . . , the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify . . . any . . . order made or issued by it."
6. The proposed modification set forth below is appropriate under the circumstances, provides the full remedy established in *Latino Express* and does not work a manifest injustice.

Wherefore, the Acting General Counsel respectfully moves this court to modify its (date) order by adding the following paragraph to more fully comport with the Board's directives in *Latino Express*:

Respondent shall be required to compensate [named discriminatees] for any adverse income tax consequences of receiving their backpay in one lump sum.

Respectfully Submitted,